United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1983

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
RUDOLPH SMALLWOOD,

Petitioner-Appellant,

-against-

HONORABLE J. E. LA VALLEE, Superintendent of Green Haven Correctional Facility, Stormville, N.Y.,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. (212) 488-7410

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel

2

TABLE OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
RUDOLPH SMALLWOOD,

Petitioner-Appellant,

-against-

HONORABLE J. E. LA VALLEE, Superintendent of Green Haven Correctional Facility, Stormville, N.Y.,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Neaher, J.) dated May 30, 1974 denying petitioner's application for a writ of habeas corpus with opinion. United States ex rel. Smallwood LaVallee, 377 F. Supp. 1148 (E.D.N.Y. 1974). On June 27, 1974 the District Court granted a certificate of probable cause.

Question Presented

Does the presence in the courtroom of persons who might seriously affect the testimony of the witness on the stand provide adequate reason for an exclusion order?

Prior Proceedings

Appellant was convicted by the verdict of a jury of the crime of manslaughter in the first degree. On August 20, 1970 at a term of the Supreme Court, Kings County (Koota, J.) he was sentenced to state prison for a maximum term of eight years. The judgment was affirmed by the Appellate Division, Second Department, 38 A D 2d 892 and by the New York Court of Appeals, without opinion, 31 N Y 2d 750.

The prosecutor's important witness was a sixteen year old pregnant girl who lived on the same block with appellant. Appellant had spoken to her. Appellant's friends had said to her "You are going to hurt our friend." The girl was frightened and afraid to testify in front of his friends who were in the courtroom. In response to the prosecutor's request the Court in the exercise of its discretion ordered the courtroom cleared of its six spectators while she testified. The record of the motion is set forth in the District Judge's

opinion supra, p. 1150, as follows:

> "Mr. Schmier: My next witness is certified by me and my experience as a lawyer as the principal witness of the case, an eyewitness to the murder, the only eyewitness to the murder.
>
> "She has told me many times, which I have not reported to the Court--
>
> "The Court: How old is this witness?
>
> "Mr. Schmier: She is fifteen -- she was fifteen at the time of the crime. She may now be sixteen.
>
> "We have had innumerable talks with her in which each one has been difficult because she is afraid. She lives on the very block with the defendant. She has been spoken to by the defendant. The defendant's friends -- we are not claiming that they threatened her or anything like that, but they consistently said, 'You are going to hurt our friend.'
>
> "Now she is here. We have secreted her in the back away from the public, which is our prerogative.
>
> "She has used the private bathroom. The girl is frightened. She is four months pregnant. Her mother said that she was not going to have her testify, because the girl could lose the baby. I assured her she would be given the highest consideration and treatment in the interest of justice, and one of the rare times I am doing -- I am imploring the Court to clear the courtroom while she testifies, because there are friends of the defendant in the courtroom, and she is afraid to testify in front of them.

"The Court: What do you say, Mr. Kaplan?

"Mr. Kaplan: Judge, I would have to object to this because I maintain this is an open forum. I never heard anything about any threats or anything as far as that goes.

"The Court: Let the record show that presently seated in the spectator section of the courtroom are six people. Three of these are colored. One of the persons I recognize as a regular court onlooker. The others we don't know about.

"Let the record also show there's no one else in the courtroom.

"Mr. Schmier: Judge, I hate to interrupt you. The colored man sitting in the courtroom, you may not recognize him, but you gave him permission yesterday to talk to the defendant.

"Mr. Kaplan: I admit --

"The Court: The Court will exercise its discretion and ask all spectators to leave the courtroom while this witness testifies.

"You have an exception.

"Mr. Kaplan: Thank you.

"The Court: Clear the courtroom.

"(All spectators leave the courtroom)"

Thereafter she testified that right after being awakened by a gunshot she saw from her bedroom window the appellant standing with a gun in his hand over the body of

the deceased. She also testified that appellant said "I'll kill him" in response to a statement from his companion who had said "Don't shoot him no more." United States ex rel. Smallwood v. LaVallee, supra, p. 1150.

ARGUMENT

THE PRESENCE IN THE COURTROOM OF PERSONS WHO MIGHT SERIOUSLY AFFECT THE TESTIMONY OF THE WITNESS ON THE STAND PROVIDES ADEQUATE REASON FOR A TRIAL COURT TO MAKE AN EXCLUSION ORDER, AND SUCH ORDER WHEN MADE WITHIN THE EXERCISE OF DISCRETION DOES NOT DEPRIVE A DEFENDANT OF A PUBLIC TRIAL.

Appellant contends that the exclusion of the public from the courtroom was a constitutional violation. The trial court made the exclusion order within the exercise of its discretion. The girl was afraid to testify in front of appellant's friends and her testimony would have been lost or seriously affected unless the courtroom was cleared while she testified. This was adequate reason for the exclusion order and appellant was not deprived of his right to a public trial. As it was stated in United States ex rel. Bruno v. Herold, 408 F. 2d 125, 127-129 (2d Cir. 1969); cert. den. 397 U.S. 957:

> "Surely there is no constitutional right to the presence of all public spectators who might desire to be present or the presence of such element as might be detrimental to

> an orderly trial uninfluenced by deterrents to truthful testimony... Even were the facts otherwise, did petitioner have a right to a trial at which were present persons who might seriously have affected the testimony of the witness on the stand? It would be difficult to find any space between the lines of the Sixth Amendment into which to write any such declaration."

See also United States ex rel. Laws v. Yeager, 448 F. 2d 74, 81 (3rd Cir. 1971); cert. denied 405 U.S. 976 in which it was said:

> "Under all the circumstances we cannot conclude that the judge erred in excluding Dennis' mother since he felt that her continued presence in the courtroom would hinder the ascertainment of the truth."

The girl's testimony consisted of less than one-sixth of the trial record. Appellant was represented by counsel who cross-examined her and presented the defense. These were not secret proceedings of the sort condemned in In Re Oliver 333 U.S. 257 (1948); See Lacaze v. United States, 391 F. 2d 516, 521 (5th Cir. 1968); United States ex rel. Orlando v. Fay, 350 F. 2d 967, 971 (2d Cir. 1965); Geise v. United States, 262 F. 2d 151 (9th Cir. 1958).

Appellant contends that the trial court should have made inquiries of the girl such as, how many people spoke to her, who they were, whether threats were made, and whether she recognized appellant's friends in the courtroom. Trial counsel did not make the suggestion for evaluation by the Court at the time of the motion and appellant should not be allowed to raise the claim at this late date. As it was stated in United States ex rel. Bruno v. Herold, supra, p. 129:

> "From the commencement until the termination of every criminal trial, countless problems arise as to admissibility of evidence, comments of court and counsel and courtroom incidents. Absent quite extraordinary circumstances, the trial counsel then on the scene should be presumed to be the best qualified to appraise the situation requiring trial rulings. Federal judges sitting in habeas corpus should be most reluctant to retry the case from the vantage point of their reflective wisdom.

CONCLUSION

THE ORDER SHOULD IN
ALL RESPECTS BE AFFIRMED.

Dated: New York, New York
October 23, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

BURTON HERMAN
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JEANETTE MARCELINA , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the ~~23rd~~ 24th day of October , 1974 , she served the annexed upon the following named person :

William Epstein, Esq.
The Legal Aid Society
Attorney for Petitioner-Appellant
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, New York 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Jeanette Marcelina

Sworn to before me this
24th ~~23rd~~ day of October , 1974

Burton Kerman
Assistant Attorney General
of the State of New York